IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1330

OTIS WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Otis Williams respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on October 3, 1978 and is reported at 581 F.2d 451.

JURISDICTION

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1). Although not timely filed, Petitioner request that his petition for writ of certiorari be entertained and that the thirty (30) day requirement of Rule 22(2) be waived. Petitioner's failure to file his petition timely was due to his financial inability to retain legal counsel until after the thirty (30) day period had expired.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly defined "curtilage" in limiting it to the walls of the remote outbuildings?

2. Whether the intrusion of the ATF agents upon the premises constituted a search within the meaning of the Fourth Amendment?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States is involved, whish is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

Several days prior to March 9, 1977, ATF agent Harry Braxton received a tip from a confidential source indicating that a still was being operated on property belonging to a Hiram Crutcher, the Petitioner's co-Defendant. Acting upon this information, Agent Braxton and

another ATF agent, Charles Moseley, drove by the Crutcher farm on the morning of March 9, 1977. Unable to observe anything from the public road they were traveling on, the agents returned to the Crutcher farm that night around 8:00 P.M., parked their car at a nearby church, and walked through a wooded area toward the two sheds located behind the Crutcher residence. [The express purpose of this trip was to obtain evidence to corroborate the information they had received from their informer.] On reaching the edge of the wooded area and still not being able to detect any evidence of a still on the property, agents Braxton and Moseley proceeded to a position closer to the two (2) sheds located behind the Crutcher residence. At this point, some thirty (30) feet from the sheds, they detected the odor of mash, but were unable to determine the source of the odor. The agents then walked toward the rear wall of the larger shed behind the Crutcher residence and upon reaching a point which they described as being within touching distance of the shed, they determined that this shed was the source of the mash odor.

Using the information gleaned from this entry onto the Crutcher farm, on March 11, 1977 agent Moseley prepared an affidavit and procured a search warrant for the Crutcher dwelling and sheds. When the warrant was executed, the Petitioner and his co-Defendant, Hiram Crutcher, were arrested on the premises. At the time of the arrest, Petitioner was carrying several one gallon jugs of moonshine whiskey. The Petitioner and Hiram Crutcher were later indicted on charges of possessing and operating an unregistered still and of possessing moonshine whiskey.

Prior to trial, Peititoner and his co-Defendant filed a Motion to Suppress contending that the Government's evidence was obtained as a result of the illegal search of the Crutcher farm on the 9th of March. Following an evidentiary hearing, the trial court denied the Motion to Suppress. During the course of trial, the Petitioner renewed his Motion to Suppress and it was again denied by the trial court. The trial resulted in the Petitioner being convicted of possessing and operating an unregistered still and of possessing five (5) gallons of moon-shine whiskey. Petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit, arguing, as he had below, that the still was located as a result of an illegal seach conducted by ATF agents.

On appeal, the Fifth Circuit affirmed the trial court decision, holding that while the shed containing the still was within the curtilage of the Crutcher residence, the agents did not intrude upon the curtilage but merely detected the odor of mash while standing outside the curtilage. The Fifth Circuit further held that - as to outbuildings - the outer limits of the curtilage are defined by the walls of the remote outbuildings. Petitioner disagrees with this very narrow interpretation of curtilage and argues, in this petition, that the agents were within the curtilage of the residence when they discovered evidence pointing to the shed as the location of the still.

REASONS FOR GRANTING THE WRIT

The question presented by the Petitioner is what is an appropriate test for determining whether an intrusion in an area adjacent to a house or dwelling is a constitutionally forbidden search.

Prior case law has analyzed this problem by making a distinction between the curtilage - that zone including the primary dwelling and structures appurtenant to it protected from unreasonable governmental intrusion - and open fields. See Hester v. United States, 1925, 265 U.S. 57, 44 S.Ct 445, 68 L.Ed, 898.

But what area does the curtilage include? Does Fourth Amendment protection against unreasonable governmental intrusion cease at the walls of the most remote outbuilding in the curtilage as was determined by the Court below? Or does the curtilage include a reasonable zone beyond the most remote building? Or should the curtilage concept which defines guarantees in terms of a specified geographical area be abandoned for a test based on a reasonable expectation of privacy, with geographical area only one of many factors to be considered in determining what is reasonable. See Michigan Law Review 154 (1977) and Wattenburg v. United States, 388 F.2d 853. (9th Cir, 1968).

Absence of a standard has resulted in conflicting holdings in similar cases in the Fifth Circuit. In United States v. Holmes, 521 F.2d 859 (5th Cir., 1975), for example, agents trespassed on the Defendant's property solely to secure evidence of illegal activity. Defendant's dwelling compound included a house and several sheds in close proximity to the main house. Shielded by the cover of woods and the sheds within the curtilage, the agents were able to get close enough to one of the sheds to see burlap bags of the kind used to bag marijuana and were able to detect the odor of marijuana. The Court held that the action of the agents constituted a search and seizure.

The Fifth Circuit conceded in its opinion in this case that the Holmes was directly on point, but refused to give it any precedential value because the Court was equally divided on the curtilage question.

If the ruling of the Court below stands, the fundamental guarantees of the Fourth Amendment regarding an individual's right of privacy in and about his home and other non-public places will be seriously eroded. To be sure, the ramifications of the Court's narrow definition of curtilage are awesome. Are law enforcement officers to be allowed to trespass without probable cause on private property in clandestine operations and secret themselves behind houses and outbuildings in search of evidence of criminal activity? Are they to be allowed to peek in windows, snoop around outbuildings, and smell around pig sheds secure in the knowledge that their actions are not prohibited so long as no part of their anatomy touches or crosses the line created by the walls of the most remote outbuildings?

It is significant that the Court did touch on the expectation of privacy question briefly. However, the Court centered its discussion on outward manfifestations of the desire for or expectation of privacy. In attempting to define the area of the curtilage, the Court below considered and then rejected using a hog fence some distance behind the shed to determine the constitutionally protected area. The Court reasoned that the fence was in such a state of disrepair that no one could have considered it a privacy fence.

Actually from a realistic viewpoint, most fences in rural settings are not privacy fences. Their purpose

is to keep livestock in rather than to serve as a warning to possible intruders. But even absent physical signs such as privacy fences, a reasonable expectation of privacy may be found based on the facts of a particular case.

Petitioner realizes that the rights of individuals against governmental intrusion must be balanced against the need for responsible law enforcement. However, adherence to the narrow definition of curtilage announced by the Court below amounts to a serious infringement of individual rights of privacy afforded by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted in order to resolve the important Fourth Amendment issues raised by this case and in order to protect the Fourth Amendment rights of Petitioner which were violated by the government on the occasion in question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 1979, three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Attorney for Petitioner

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OTIS WILLIAMS, Defendant-Appellant.

No. 77-5538.

United States Court of Appeals
Fifth Circuit.

Oct. 3, 1978.

Defendant was convicted in the United States District Court for the Northern District of Mississippi, William C. Keady, J., of possessing and operating an unregistered still and of possessing five gallons of moonshine whiskey. Defendant appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) as to outbuildings that are not encompassed by a fence that also includes a house, or perhaps a privacy or exclusionary one around them, outer limits of curtilage, for Fourth Amendment purposes, are defined by walls of remote outbuildings, and (2) where agents did not intrude upon the curtilage but merely detected the odor of mash while standing outside the curtilage, their furtive trespass, though carried to the very verge of proprierty, did not render the search warrant invalid.

1. Searches and Seizures

Expectations test has done away with outmoded property concepts no longer satisfactory for Fourth Amendment analysis, but distinction between open fields and curtilage is still helpful in determining existence or not of reasonable privacy expectation. U.S.C.A. Const. Amend. 4.

2. Searches and Seizures

Shed which was domestic building constituting integral part of group of structures making up farm home, where shed was approximately 50 yards from house and was not separated from house by any fence, outbuilding or great expanse of

open land, was within curtilage of dwelling, for purposes of Fourth Amendment protection against search. U.S.C.A. Const. Amend. 4.

3. Searches and Seizures

Where fence was not privacy fence or exclusionary one but had been meant to do no more than keep hogs in, and where, by virtue of its condition when agents stepped over it, it offered little if any, impediment either to vision or to ingress, and where fence did not then encompass house but was mere appurtenance of shed, which agents did not actually enter, outer limits of curtilage, for Fourth Amendment purposes, were defined by walls of the remote outbuildings and there was no intrusion upon curtilage so defined. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures

As to outbuildings that are not encompassed by fence that also includes or perhaps a privacy or exclusionary one around them, outer limits of curtilage, for Fourth Amendment purposes, are defined by walls of remote outbuildings. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures

Where agents did not intrude upon curtilage but merely detected odor of mash while standing outside curtilage, their furtive trespass, though carried to very verge of propriety, did not render search warrant invalid. U.S.C.A. Const. Amend. 4.

Appeal from the United States District Court for the Northern District of Mississippi.

Before COLEMAN, GEE and HILL, Circuit Judges.

GEE, Circuit Judge:

Appellant Williams was convicted of possessing and operating an unregistered still and of possessing five gallons of moonshine whiskey. He appeals on fourth

contending that the still was located as a result of an illegal search conducted by federal agents from the Bureau of Alcohol, Tobacco and Firearms (ATF). We disagree and affirm the convictions.

Federal Agent Harry Braxton received a tip from an undisclosed source that a still was being operated on Hyrun Crutcher's property in Marshall County, Mississippi.[1] Acting on this information Braxton and one other ATF agent, Charles Mosley, drove by the suspected location of the still but could see nothing from the public highway. Later the same evening the agents returned. This time they left their car at a nearby church

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1. The government admits that this tip did not constitute probable cause for a search of Crutcher's land.

and stole southward through a wooded area toward the outbuildings of the Crutcher farmstead situated some fifty yards north of and behind the Crutcher residence, which faced south. Still unable to detect any evidence of a still, they crawled across a clearing and took cover behind an overturned truck adjacent to the northeast corner of a dilapidated fence. This fence formed a square hogpen by connecting with two sheds at its northwest and southwest corners. From their position behind the wrecked truck, the agents detected the ordor of moonshine liquor and fermented mash coming from the direction of the hogpen. Mosley then crept down the east side of the fence until he could see the open area of about fifty yards between the pen and two houses, one of which belonged to Crutcher's daughter. Here he noted a garden hose running from a faucet in Crutcher's yard toward the

larger of the two sheds, which stood at the southwest corner of the fence. He could not determine whether the hose actually entered the shed. He then retraced his steps, and both agents crossed over the fence at a place where it had been walked down alomst to the ground. As they approached the rear wall of the larger shed, the increasing strength of the tell-tale odors identified it as their source.

Armed with the information obtained in this investigation, the agents prepared an affidavit and procured a search warrant for Crutcher's property. When they executed the warrant, both Crutcher and appellant Williams were arrested on the premises, the latter carrying three one-gallon jugs of moonshine. Crutcher later pleaded guilty, while Williams unsuccessfully maintained his innocence.[2]

[1] Since Katz v. United States, 389 U.S. 347, 88 S.Ct., 507, 19 L.Ed. 2d 576 (1967), the applicability of the fourth amendment has been said to depend upon the existence of a "reasonable expectation of privacy." 389 U.S. at 360, S.Ct. 507 (Harlan, J. concurring). Although the expectation test had done away with outmoded property concepts no longer satisfactory for fourth amendment analysis, see the Supreme Court, 1967 Term, 82 Harv.L.Rev. 63, 189 (1968), the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable

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2. Although the still shed rested on property owned by neither Williams nor Crutcher, but by Crtucher's daughter, the government unaccountably concedes standing, and that issue is not before us.

privacy expectations. See generally Note, 76 Mich.L.Rev. 154, 177-79 (1977). We have held that open fields surrounding a house are not protected under the fourth amendment and that a search of them need not be accompanied by a warrant issued upon probable cause. See, e.g., United States v. Brown, 473 F.2d 952, 954, (5th Cir. 1973); Atwell v. United States, 243 F.2d 281, 283 (5th Cir. 1957). As to curtilage, however, the "home [and] its immediate appurtenance," Hodges v. United States, 243 F.2d at 283, we have held that warrantless searches are improper absent exigent circumstances, at least when the investigating officers have intruded upon the curtilage for the purpose of conducting a search for criminal activity. See United States v. Davis, 423 F.2d 974, 976-77 (5th Cir.), cert. denied, 400 U.S. 836, 91 S.Ct. 74, 27 L.Ed.2d 69 (1970). Cf. United States v. Knight, 451 F.2d 275, 278-79 (5th Cir. 1971), cert. denied sub nom. Grubbs v. United States, 405 U.S. 965, 92 S.Ct. 1171, 31 L.Ed.2d 240 (1972) (upholding the admission of evidence discovered in "plain view" while officers were legitimately within the curtilage for another purpose).

[2] Our prior case law forces us to conclude that the still shed in this case was within the curtilage of the dwelling occupied by Hyrum Crutcher's daughter. While this shed was approximately fifty yards from the house, we held in Walker v. United States, 225 F. 2d 447 (5th Cir. 1955), that curtilage included a barn seventy to eighty yards from the principal dwelling. More important, as in Walker, the Crutcher shed was "a domestic building constituting an integral part of that group of structures making up the farm home,"

225 F.2d at 449, because it was not separated from the house by any fence, outbuilding, or great expanse of open land. See Hodges v. United State, 243 F.2d at 283.

[3] The fact that the shed itself is within the curtilage is not necessarily dispositive, however, since the agents never actually entered the shed. This circumstance forces us to attempt to draw a rational line between the curtilage and the "open fields." Clearly, if the agents had gone no farther than the wrecked truck we would have upheld the search under the "open fields" doctrine, since the wreck was no part of the farmstead and merely defined a point in those fields. Nor do we think that the dilapidated hogpen fence, stepped over by the agents on their foray to the back of the wall of the shed, defines the curtilage. In the past we have not considered the crossing of a fence significant unless the fenced area included the house. See, e.g., Brook v. United States, 243 F.2d 281 (5th Cir. 1957). Here the broken-down fence the agents crossed did not encompass the house but was a mere appurtenance of the shed.

The fence in question here was not a privacy fence or an exclusionary one; in its best days, it was meant to do no more than keep the hogs in, not to keep anyone out. In its condition when the agents stepped over it, it offered little, if any, impediment either to vision or to ingress. In view of these considerations, we think that the fence was not such as to create either any reasonable expectation of added privacy or to either join the still shed to or separate it from the residences. We therefore conclude that, whatever minor

practical significance it may have retained for the hogs, it has no legal significance for us.

In legal contemplation, therefore, the case is to be viewed as though the agents had merely approached the back wall of an extreme outbuilding across open fields. Our prior case law affords us no guidance in determining the extent of the curtilage beyond the most remote building in the curtilage in the absence of a fence that encompasses the house. United States v. Holmes, 521 F.2d 859, 869 (5th Cir. 1976), aff'd by an equally divided court, 537 F.2d 227 (5th Cir. 1976) (en banc), seems squarely on point, but it is not binding on this issue. Although the majority of the court en banc purported to adopt the panel's discussion entitled "The Search of the Shed," the panel's holding has no precedential value because the court was equally divided on this issue. Neither is United States v. Davis, supra, applicable, because the agents in this case were prowling around an outbuilding, not a house.

[4] Three possible ways of defining the curtilage suggest themselves: drawing the line an arbitrary distance from the most remote outbuilding in the curtilage, holding that the curtilage includes a "reasonable zone" beyond the outer limits of the extreme outbuildings of the curtilage define the outer limits of the curtilage. Rejecting an arbitrary distance as being irrational and a "reasonable zone" as being too vague for guidance, we hold that, as to outbuildings that are not encompassed by a fence that also includes the house, or perhaps a privacy or exclusionary one around them, the outer limits of the curtilage are defined by the walls of the remote outbuildings. Certainly such buildings

give an added expectation of privacy for their contents, but we see none as to the area outside and beyond them.

[5] Because the agents in this case did not intrude upon the curtilage so defined but merely detected the odor of mash while standing outside the curtilage, their furtive trespass, though carried to the very verge of proprierty, does not render the search warrant invalid. Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.ED 898 (1924); Fulbright v. United States, 392 F.2d 432 (10th Cir.) cert. denied, 393 U.S. 830, 89 S.Ct. 97, 21 L.Ed. 101 (1968).

Accordingly, the judgment below is AFFIRMED.